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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 696

ALPHA ENTERPRISES, INC., *Petitioner,*

v.

CITY OF HOUSTON, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI

To The Court Of Civil Appeals For The First Supreme Judicial District Of The State Of Texas

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Petitioner, ALPHA ENTERPRISES, INC., prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas entered in the above entitled cause on May 17, 1967.

CITATION TO OPINION BELOW

The opinion of the Court of Civil Appeals printed in Appendix "A" hereto, Appendix page 9, is not officially reported but is printed in 411 S.W.2d 417. The Supreme Court of Texas wrote no opinion in refusing Petitioner's Application for Writ of Error.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on January 26, 1967. A timely motion for rehearing, filed on February 10, 1967 was overruled on February 16, 1967. Petitioner's Application for Writ of Error to the Supreme Court of Texas timely filed on March 27, 1967 was refused, no reversible error on May 17, 1967. A timely motion for rehearing on that Application was filed on June 1, 1967 and was overruled on July 12, 1967. The Court of Civil Appeals thus became, in this case, the highest court of the state in which a decision could be had. *Panhandle Eastern Pipe Line Company v. Calvert,* 347 U.S. 157.

The Supreme Court of Texas having denied Application for Writ of Error with the docket notation "Refused. No reversible error", certiorari is properly directed to the Court of Civil Appeals as "the highest court of a state in which a decision could be had". 28 U.S.C.A. Section 1257(3). Judgment was not final until the order entered on July 12, 1967 denying the Motion for Rehearing on the Application for Writ of Error.

QUESTIONS PRESENTED

The Petitioner is a lawfully authorized and licensed business establishment, licensed by the State of Texas as a Fireworks Distributor. Petitioner has been issued License No. D-8-66 by the State Fire Marshal of the State of Texas. The business services the Southwestern states of the United States and receives and forwards shipments of fireworks in Interstate Commerce. All such shipments of fireworks received and stored by Petitioner for distribution in Interstate Commerce are received and forwarded without breaking the sealed package. The State

Court held that such packaged product was a common and public nuisance which could be confiscated and destroyed by the City of Houston, Texas, even though the business was engaged in Interstate Commerce. These questions are thus presented:

I

Whether the Due Process Clause and the Equal Protection Clause were violated by the State Court in denying Petitioner compensation for the taking of his property without due process of law.

II

Whether the Due Process Clause and the Equal Protection Clause were violated by the refusal of the State Court to grant Petitioners an injunction enjoining the City of Houston from confiscating its property as a common and public nuisance when under the laws of the State of Texas:

(A) The City of Houston, Texas cannot declare a business to be a nuisance which is not a nuisance in fact.

(B) The City of Houston, Texas cannot prohibit, confiscate and destroy a licensed and lawful product while in shipment in Interstate Commerce.

CONSTITUTIONAL PROVISIONS, STATUTES, CHARTER PROVISIONS, AND ORDINANCES INVOLVED

(1) The Equal Protection Clause and the Due Process Clause of the 14th Amendment to the United States Constitution.

(2) Article I, Section 8, Clause 3, United States Constitution.

(3) The statutes, charter provisions and ordinances involved are set out in Appendix.

STATEMENT OF THE CASE

I. *Procedural Processes Through The State Courts.*

This is an injunction suit. It was instituted by Petitioner in the 80th Judicial District Court of Harris County, Texas, to restrain the Fire Marshal of the City of Houston from carrying out his threat to and from summarily confiscating and destroying the property of Petitioner, ALPHA ENTERPRISES, INC., as a common and public nuisance. A temporary injunction was issued by the 133rd Judicial District Court of Harris County, Texas. After hearing on the merits of the case for a permanent injunction, the 80th Judicial District Court of Harris County, Texas, denied the Petitioner a permanent injunction. Pending the Application for Writ of Certiorari, the Court of Civil Appeals has issued its injunction to preserve the jurisdiction of the subject matter. (Appendix B)

II. *The Facts Material To The Questions Presented.*

Your Petitioner, ALPHA ENTERPRISES, INC., has been engaged in a lawful business at 12514 Gulf Freeway, Houston, Texas, *for thirteen (13) years*, doing business as ALPHA ENTERPRISES, INC. This location is *approximately sixteen (16) miles from downtown Houston.* Such business is lawfully authorized and licensed to engage in business by the State of Texas as a Fireworks Distributor. Petitioner has been issued License No. D-8-66 by the State Fire Marshal's Department of the State of

Texas, to operate said business, and stands periodic inspection by the State of Texas Fire Marshal. This license is issued under the authority of *Article 1725* Vernon's Annotated Penal Code, regulating and permitting the storage of fireworks in the State of Texas.

On November 16, 1965, the City Council of the City of Houston enacted ordinance No. 65-1515 which annexed additional territory adjacent to the territorial limits to the City of Houston, including the property owned by the Petitioner. However, the property located immediately to the rear of Petitioner's property was not annexed under such ordinance and is still located in the County outside of the Houston City Limits.

This business continued to operate without disturbance until on or about the 21st day of March, 1966, when Petitioner received from the Fire Marshal of the City of Houston a letter advising it that the property of the business would be confiscated and destroyed if it were not removed from the premises and from within the territorial limits of the City of Houston. Such letter was written by the Fire Marshal under the purported authority of Article IV, Section 15-66, Code of Ordinances, City of Houston, Texas, which declares the presence of fireworks within the City of Houston a "common and public nuisance."

III. *Federal Questions Raised In Court Below.*

(A) Trial Court: Petitioner urged in the Trial Court, by its pleadings and evidence, that its products were in Interstate Commerce and that as a packaged product being shipped in Interstate Commerce they could not be confiscated and destroyed by the City of Houston, Texas, Fire Marshal as a common and public nuisance.

(B) Court of Civil Appeals: Under the rules governing appeals to the Court of Civil Appeals, the appealing party is required to file a brief containing a statement of points upon which the appeal is predicated. Texas Rules of Civil Procedure, Rule 418. Point 7 in the "Appellant's Motion for Rehearing" (Petitioner) urged that the Court of Civil Appeals erred in restricting the uses of Petitioner's property without due process, in violation of the United States Constitution and the Constitution of the State of Texas. In Point 10 in the same Motion for Rehearing, Petitioner urged that the Court had erred in holding that a city ordinance can interfere by prohibiting transportation of fireworks in Interstate Commerce. The opinion of the Court of Civil Appeals does not mention these points, but they were overruled by the Court affirming the Judgment of the Trial Court. (Appendix A, pp. 19-29)

(C) The Supreme Court of Texas: The rules governing Applications for Writ of Error require a statement of the points of error relied upon. Texas Rules of Civil Procedure, Rule 469. Point 9 in Petitioner's Application for Writ of Error stated that the Court of Civil Appeals erred in restricting the use of Petitioner's property without due process in violation of the United States Constitution, and the Constitution of the State of Texas. Point 10 in Petitioner's Application for Writ of error stated that the Court of Civil Appeals erred in holding that a city ordinance can interfere with Interstate transportation of fireworks. The Supreme Court overruled both of these points by denial of the Application for Writ of Error with the docket notation "Refused. No reversible Error". This notation means that the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all

respects has correctly declared the law, but is of the opinion that the Application for Writ of Error presents no error which requires reversal and approves the Judgment of the Court of Civil Appeals. Texas Rules of Civil Procedure, Rule 483; *Johnson v. Zurich General Accident and Liability Insurance Company,* 146 Tex. 232, 25 S.W.2d 353 (1947); Calvert, The Application for Writ of Error, 3 Franki Texas Rules of Civil Procedure, 404, 411; Simpson and Wall, Problems of Precedent affecting Court of Civil Appeals opinions, 4 S.W.L.J. 398, 403.

A Motion for Rehearing on the refusal of an Application for Writ of Error is required to be filed within fifteen (15) days and to distinctly specify the grounds relied upon for the rehearing. Texas Rules of Civil Procedure, Rule 515. Point of Error 1 of Petitioner's Motion for Rehearing on Application for Writ of Error urged again that the Court of Civil Appeals erred in overruling the Petitioner's point of error, reading as follows:

> "Appellant's operation of a business as a Fireworks Distributor under license and regulations of the State of Texas is not a common and public nuisance which can be summarily confiscated and destroyed by the Appellee, City of Houston; therefore, the District Court erred in refusing to grant Appellant a permanent injunction to prevent the enforcement of an invalid ordinance."

Point of Error 9 of Petitioner's Motion for Rehearing on Application for Writ of Error urged again that the Court of Civil Appeals erred in restricting the use of Petitioner's property without due process, in violation of the United States Constitution. Point of Error 10 of Petitioner's Motion for Rehearing on Application for Writ of Error also urged again that the Court of Civil Appeals erred in hold-

ing that a city ordinance can interfere with Interstate transportation of fireworks. The order overruling the Motion for Rehearing overruled all of these Points of Error.

(D) Summary: The Petitioners anticipated and attempted to forewarn the State Courts that a refusal of the issuance of an injunction enjoining the City of Houston from declaring that to be a nuisance which was not a nuisance in fact and confiscating and destroying the property of Petitioner summarily did constitute a denial of rights under the Constitution of the United States. It was pointed out that such action was a denial of equal protection of the laws and due process under the Constitution of the United States. The Trial Court in its judgment denying injunctive relief stated only that the City Council of the City of Houston acted in good faith in enacting or passing the subject Ordinance No. 8941, and that said City Council did not act fraudulently, arbitrarily, unreasonably or capriciously in enacting or passing City Ordinance No. 8941 and that said subject Ordinance No. 8941, which prohibits the storage of fireworks in the City of Houston, Texas, is constiutional and valid. This Petitioner assigned such ruling as error in their Application for Writ of Error and the Motion thereon, both of which were overruled. Under this record the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Civil Appeals, if allowed to stand, will permit the Fire Marshal of the City of Houston to summarily confiscate and destroy the property of the Petitioner on the loading docks of railroad company

property, motor carrier depots and other motor carriers wherein packaged fireworks are found within the City of Houston, even though such packaged fireworks are in Interstate Commerce. This result is clearly not in accordance with the intent of Congress, and is in violation of the Constitution of the United States providing for regulation of Interstate Commerce. It deprives the Petitioner of engaging in a lawful licensed business operation because of the fact that such packaged products may be confiscated, by the City Fire Marshal, wherever they may be, if their mere presence is within the City Limits of the City of Houston.

If this opinion is permitted to stand, Petitioner has thus been deprived of the right afforded it under the Constitution of the United States to receive and forward shipments of fireworks in Interstate Commerce, as it is doing in the operation of said business.

All of the evidence in this case shows that the Petitioner has had, at all times since 1958, when the fireworks business in Texas became a regulated business by the State Legislature, a valid license to store and distribute fireworks as a commodity issued by the State of Texas, and is legally inspected and approved by the State Fire Marshal's Department of the State of Texas. Such license is issued under the express authority granted by *Article 1725,* Vernon's Annotated Penal Code, State of Texas, regulating and permitting the storage of fireworks in the State of Texas, with no restriction or limitation to the City of Houston.

Petitioner has thus been dealt with in the following manner, contrary to all authority and law:

(1) The business of Petitioner, shown to have been engaged in Interstate Commerce, has been declared a common and public nuisance without any support in fact or law;

(2) The property of Petitioner will be confiscated and destroyed without benefit of a judicial determination as to whether it was or was not a nuisance in fact or law if found in the city limits of the City of Houston, Texas.

(3) The property declared to be a nuisance and subject to being summarily confiscated and destroyed is a business licensed, regulated and authorized by the State of Texas;

(4) The personal property of Petitioner is actually authorized and regulated in its use by Motor Carriers Explosives and Dangerous Articles Tariff II, Interstate Commerce Commission, effective October 3, 1962.

(5) The personal property of Petitioner is further authorized for transportation by The Uniform Highway Act, Vernon's Annotated Civil Statutes, Article 6701d, State of Texas

This exact ordinance in another Texas city to wit: "The presence of fireworks within the jurisdiction of the City of Fort Worth in violation of this ordinance is hereby declared to be a nuisance.", was declared to discriminate against Interstate Commerce and to impede its movement in regular course and thus was in conflict with the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, in *City of Fort Worth v. Atlas Enterprises,* 311 S.W.2d 922 (Fort

Worth Court of Civil Appeals, 1958). Therein the Court said:

> "Furthermore, since the ordinance discriminates against interstate commerce, will impede its movement in regular course, and will affect it directly, it is in conflict with the commerce clause of the United States Constitution, art. 1, Section 8, cl. 3. Title 18 U.S.C.A., Ch. 39, Section 835, exhibits congressional delegation of authority to the Interstate Commerce Commission to regulate and control the transportation within the limits of the United States of explosives and combustibles. Fireworks are of this character. Regulations of the Interstate Commerce Commission have been promulgated pursuant to authority so conferred. The regulations are before us."

Moreoyer, the ordinance was shown to be in conflict with the laws of the State of Texas. On this point, the Court said:

> "The ordinance is in conflict with the laws of the State of Texas. The Legislature was prohibited from passing any local or special law authorizing the regulation of trade. Const. Art. 3, sec. 56, Vernon's Ann. St. The Uniform Highway Act, Vernon's Ann. Civ. St. Art. 6701d, relates to the transportation of explosives on state highways. Section 139 thereof provides for the marking of vehicles carrying explosives and authorizes the Director of Public Safety and the Railroad Commission of Texas to issue regulations on that subject and regulations have been issued. Said article provides that the Act shall apply in all political subdivisions and municipalities, and limits the powers which may be exercised by local authority in respect to streets and highways through enumeration of those which may be so exercised."

The Court further stated the principle of law regulating the lawful exercise of the police power of a municipality in its lawful authority. On this point, the Court said:

> "Lawful exercise of the police power of a municipality may not be contrary to the State or the Federal Constitution or the governmental powers created thereby, because the legitimate scope of the municipal police power ends where constitutional inhibitions begin. 37 Am. Jur., p. 920, "Municipal Corporations," sec. 285, "Constitutional Limitations." A business authorized or regulated by state statute cannot be prohibited by city ordinance, and ordinances which are in conflict therewith on the same subject are necessarily void. Murphy v. Wright, Tex. Civ. App., Fort Worth 1938, 115 S.W.2d 448. Transportation of commodities incident to transactions regulated by Federal law under Constitutional control cannot be prohibited by a state or its subdivisions. Actiesselskabet Ingrid v. Central R. Co. of New Jersey, 2 Cir. 1914, 216 F. 72, L.R.A. 1916B, 716; Watson Bros. Transportation Co. v. City of Omaha, D.C. Neb. 1955, 132 F. Supp. 6. Both are cases upon explosives. See annotated cases having analogy in 47 Amer. St. Rep., beginning at page 536."

It is well established that the Constitution of the United States protects Interstate Commerce against substantial burdens or obstructions, regardless of their source. *Whitmore v. Bureau of Revenue of State of New Mexico*, 64 F. Supp. 911, affirmed 67 S. Ct., 329 U.S. 668.

There is no question but that Petitioner is entitled to receive fireworks shipped from other states within the United States, and from foreign countries to Houston, Texas. The State of Texas has specifically authorized the sale, storage, transportation and use of fireworks within the State of Texas. Article 1725 Vernon's Annotated

Penal Code, State of Texas. Therefore, fireworks are not that class of property made unlawful through its presence and possession in the State of Texas.

However, under the ordinance of the City of Houston, Texas, of which Petitioner makes complaint as being unconstitutional and a direct burden upon Interstate Commerce, the presence of fireworks within the city limits of the City of Houston is declared to be a common and public nuisance, and the Fire Marshal is instructed to confiscate and destroy such fireworks found to be present within the City of Houston. Clearly, such ordinance, making the presence of fireworks a nuisance and authorizing their destruction makes no provision for fireworks being transported, or stored in Interstate Commerce freely from seizure, and destruction. Consequently, Petitioner's property is subjected to being confiscated and summarily destroyed by the Fire Marshal of the City of Houston as a common and public nuisance even though such product is in the process of being in shipment in Interstate Commerce, or being stored temporarily for delivery.

In the case of *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 2 Cir. 1914, 216 F. 72, L.R.A. 1916B 716, the Court held that the transportation of commodities incident to transaction regulated by the federal law under Constitutional control cannot be prohibited by a state or its subdivisions. The same rule was applied in *Watson Bros. Transportation Co. v. City of Omaha*, D.C. N,E,B, 1955, 132 F. Supp. 6. These cases involved identically the same commodities as the fireworks are in this case, and the same ruling is applicable to this case.

The opinion of the Court of Civil Appeals neither clearly states nor properly analyzes the fundamental prob-

lem here. No authority cited by it is in point, and it neither cites nor discusses any authorities urged by the Petitioner in support of his position. There is, however, clear authority in the State of Texas which prohibits the Legislature of the State of Texas from delegating its authority to a municipality to set aside, vacate, suspend, or repeal the general laws of the State of Texas. Any act of the Legislature which seeks to confer such jurisdiction upon a municipal corporation is violative of the Constitution of Texas. *Arroyo v. City of Dallas,* 69 S.W. 503, (Court of Criminal Appeals, 1902). In the face of this holding by the highest Court of the State of Texas, the reasoning of the Court of Civil Appeals supporting Section 14 of Article 1725 V.A.P.C. is clearly unconstitutional. The Court of Civil Appeals seeks support by declaring that Section 14 authorizes the invalid ordinance declaring the presence of fireworks within the City of Houston to be a common and public nuisance. In the face of the rule established in *Arroyo v. City of Dallas,* Supra, the State Legislature is not authorized to delegate its authority contrary to the general law as stated by the Legislature in its own statute.

In *Murphy v. Wright,* 115 S.W.2d 448 (Ft. Worth Court of Civil Appeals 1938), the Court held that a business authorized or regulated by state statute cannot be prohibited by city ordinance, and ordinances which are in conflict therewith on the same subject are void. The same rule was announced by the Supreme Court of Texas in *Berry v. City of Ft. Worth,* 132 Tex. 599, 124 S.W.2d 842 (1939), wherein it was said "no ordinance of a city operating under a home rule charter can contain any provision inconsistent with our constitution, or the general laws of this state."

Furthermore, the judgment of the Court of Civil Appeals, if allowed to stand, approves an ordinance which violates the Fourteenth Amendment to the Constiution of the United States and denies to Petitioner the equal protection of the laws as well as taking the Plaintiff's property without due process. *Chicago B. & Q. R. Co. v. Illinois,* 200 U.S. 561, 50 L.ed 596, 26 S.Ct. 341.

It is generally recognized anything which is detrimental to health or which threatens danger to persons or property within a city may be retarded and dealt with by the municipal authority. Under a general grant of power respecting nuisances, the municipal corporation may declare a thing a nuisance which is one in fact, but without express charter power, the general rule is that the city cannot declare by ordinance a nuisance which is not so in fact. To constitute a thing a legal nuisance, it must be so in fact, regardless of declaration of an order on the subject. *City of Miami Beach v. Texas Company,* 194 So. 368 (Supreme Court of Florida, 1940).

In *Crossman v. City of Galveston,* 247 S.W. 810 (Sup. Ct. Tex.), the Court said:

> "* * * Not having express statutory sanction for the ordinance, the city was without authority to declare any dilapidated building a nuisance unless it was so in fact. The rule is that, in the absence of express legislative sanction, a city is without authority to declare that a nuisance which is not so per se or at common law. Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Spann v. City of Dallas, 235 S.W. 513, 514, 19 A.L.R. 1387; People v. City of Chicago, 261 Ill. 16, 103 N.E. 609, 49 L.R.A. (N.S.) 438, 442, Ann. Cas. 1915A 292; Allison v. City of Richmond, 51 Mo. App. 133; Shreveport v. Leiderkrantz Society, 130 La. 803, 58 So. 578, 40 L.R.A.

(N.S.) 75, 79; 20 R.C.L. pp. 389, 390, 414, 431 and notes; Dillon on Municipal Corp. (5th Ed.) Sec. 684."

The testimony of the Petitioner at the trial on the merits reflected that there were stored at Petitioner's place of business fireworks amounting to approximately Thirty-Eight Thousand and no/100 ($38,000.00) Dollars actual cost. In addition to said fireworks, the testimony further disclosed that Petitioner holds its property subject to a mortgage requiring the payment of over Nine Hundred and no/100 ($900.00) Dollars per month and Petitioner has no other income other than its distribution of fireworks as a licensed distributor, and unless it obtains the necessary income for the payment of said mortgage on said land, it stands to lose its land by foreclosure of the Deed of Trust lien held by the holder of same. It must be remembered that Petitioner cannot store fireworks or possess fireworks under the law of the State of Texas, unless his place of business is inspected and licensed for such storage of fireworks by the Commissioner of Insurance of the State of Texas. Petitioner has no other place to store its fireworks in the event it is compelled to remove its fireworks from its present place of business and operation.

A lawful, licensed business regularly inspected by the Fire Marshal of the State of Texas cannot be a common and public nuisance and the declaration of the ordinance of the City of Houston declaring the mere presence of fireworks within its city limits to be a common and public nuisance was, therefore, invalid and void. The impossibility when viewed in this light becomes apparent that the business of the Petitioner is not and cannot be

a common and public nuisance which can be summarily confiscated and destroyed by the City of Houston under the guise that it is a nuisance per se.

In *State v. Thomason*, 378 P.2d 441, 61 Wash. 2d 425, the Court held that in absence of facts establishing nuisances or circumstances showing conditions substantially detrimental to public health, safety, morals or welfare, zoning ordinances which attempted to immediately abolish existing nonconforming uses are unconstitutional insofar as they deprive individuals of vested rights without due process of law. Petitioner finds himself in this exact position. One day he operates a lawful licensed business establishment under regulation and license of the State of Texas and on the next day finds that his property has been declared a common and public nuisance about to be summarily confiscated and destroyed. Needless to say, such destruction will be without any compensation whatever.

CONCLUSION

The jurisdiction and power to enforce the rights granted to Petitioner under Art. 1 of the United States Constitution and the 14th Amendment thereto rests in this Court. Petitioner has no other remedy. The clear provisions of Art. 1 and the 14th Amendment and the cases decided under them by this Court enable Petitioner to the relief sought.

For the foregoing reasons, this petition for writ of certiorari should be granted.

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APPENDIX "A"

ALPHA ENTERPRISES, INC., Appellant,
vs.
THE CITY OF HOUSTON ET AL, Appellees.

Appeal from District Court of Harris County

NO. 15016

By this suit appellant seeks to prevent appellees from enforcing that portion of the Fireworks Ordinance of the City of Houston, Texas, declaring "the presence of any fireworks within the jurisdiction of the City in violation of this Article is hereby declared to be a common and public nuisance. The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this Article. . . ."

At a trial to the court without, a jury, judgment was rendered denying the relief prayed for. No findings of fact or conclusions of law were requested and none were filed other than as reflected in the judgment.

The judgment recites that "the Court . . . is of the opinion that the City Council of the City of Houston, Texas, acted in good faith in enacting or passing the subject Ordinance Number 8941, and the said City Council did not act fraudulently, arbitrarily, unreasonably or capriciously in enacting or passing said Ordinance Number 8941, and that said subject Ordinance Number 8941, which prohibits the storage of fireworks in the

City of Houston, Texas, is constitutional and valid, and that Plaintiff is not entitled to any injunctive relief herein, ..."

"Ordinance Number 8941 was not introduced into evidence. Only Sec. 15-66 of Art. IV of the Code of Ordinances of the City of Houston is found in the statement of facts." As recited it declares the presence of fireworks within the City "in violation of this Article" to be a public nuisance and directs certain officials to seize and destroy fireworks found within the City "in violation of this Article."

There is testimony that Ordinance 8941 was enacted by the City Council in 1953 and appellees state in their brief that Ordinance 8941 prohibits the storage of fireworks within the City. Appellant pled that the ordinance prohibited the storage of fireworks within the City. Since the case was tried on the theory that the storage of fireworks within the City was prohibited without exception, and since all parties have briefed the case on that basis, we accept as true the statements that the storage of all types of fireworks is absolutely forbidden by the terms of the Ordinance.

The question, then, is whether the City is authorized to declare that the presence of fireworks of any kind and in any quantity and for any length of time constitutes a nuisance wherever they may be located within the City because the storage of fireworks within the City has been made unlawful by Ordinance.

The City of Houston is a home rule city authorized by its charter to exercise all powers that have been or hereafter may be granted to municipalities by the Constitution or laws of Texas. Art. 1068(7), V.A.C.S., pro-

vides that the City Council shall have power to *prohibit the keeping of buildings* for the storing of gunpowder and other combustible, explosive or dangerous materials within the City. Section 6 of the same Article authorizes the City to prohibit the use of fireworks. Section 19, Article 1175, V.A.C.S., provides that each city shall have the power to define all nuisances and prohibit the same within the city and outside the city limits for a distance of 5,000 feet.

The Ordinance under attack here was held valid in Threadgill v. State, 275 S.W.2d 658, Tex. Crim. App. 1954, where the Court said:

"It appears that it is now definitely settled by the courts of this and other jurisdictions that fireworks constitute such danger to the public health and safety as to constitute them a nuisance, and the sale thereof may be prohibited by municipalities in the exercise of their police power. [citing authorities]

". . . .

"The conclusion is expressed that the legislature was authorized to confer upon the City of Houston the right to prohibit the maintenance of the nuisance beyond the city limits as a necessary attribute of the power, in the first instance, to prohibit nuisances dangerous to the public health and safety of the city."

In Stoughton v. City of Fort Worth, 277 S.W.2d 150, Tex. Civ. App. Fort Worth 1955, n.w.h., the court upheld an ordinance of the City of Fort Worth declaring the presence of any fireworks within the jurisdiction of the City of Fort Worth in violation of the ordinance a nuisance. The Court said:

"Although it is only in clear cases that courts are warranted in going behind the findings of a legislative body that a certain thing is a nuisance and determining the contrary, nevertheless, a city cannot by ordinance make that a nuisance which is not one in fact. Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810; Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513; Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 12 A.L.R. 1116; Murphy v. Wright, Tex. Civ. App., 115 S.W.2d 448; 20 R.C.L., p. 389, sec. 12. The controlling question, therefore, seems to be whether the transporting, storing, selling, and hauling of fireworks within 5,000 feet of appellee's city limits constitute a public nuisance per se.

". . . .

"Without doubting the power of a court to strike down a city council's definition of a nuisance when the act or condition so denounced does not tend to be injurious to public good, we may not do so when the act or condition sought to be prevented is almost if not quite universally held to be inherently dangerous and to constitute a hazard to property and 'a menace to the life, limb and health'."

In Cannon v. The City of Dallas, 263 S.W.2d 288, Tex. Civ. App., El Paso 1953, n.w.h., the Court upheld the validity of an ordinance prohibiting the possession, storage, transportation or use of fireworks of all kinds. The Court stated that it is common knowledge that the use of fireworks in crowded areas is dangerous to both life and property and upheld the trial court's finding of fact that fireworks and firecrackers are inherently dangerous to life, limb, and property.

In Ex Parte Clark, 140 S.W.2d 854, Tex. Crim. App. 1940, the Courts upheld the validity of an ordinance of the City of Dallas, Texas, prohibiting the sale, offering for sale, or possession for the purpose of sale, of any combustible fireworks of any kind in said city as a legitimate exercise of the public power bearing a reasonable relation to the protection of the peace, lives, health and property of its inhabitants, and in particular protection from fire hazards.

Appellant points to the well established rule of law that neither a municipality nor the state may by legislation make that a nuisance which is not in fact a nuisance. Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923); Stockwell v. State, 110 Tex. 550, 221 S.W. 932 (1920).

In Trueheart v. Parker, 257 S.W. 640, Tex. Civ. App., San Antonio 1923, n.w.h., opinion by Chief Justice Fly, the Court said:

"A hall used for dancing is not a nuisance per se; yet, if accompanied with drunkenness, swearing, loud and boisterous language, or disorderly conduct, it may become a nuisance. Unless a dance hall is condemned by law, whether it is or is not a nuisance is a question of fact to be tried as any other fact by a jury. . . .

"A nuisance, broadly stated, is anything that works an injury, harm, or prejudice to an individual or the public. According to definitions formulated from numerous decisions, a nuisance will embrace everything that endangers life or health, offends the human senses, transgresses laws of decency, or obstructs, impairs, or destroys the reasonable, peaceful, and comfortable use of property. . . .

Acts which are denounced as illegal by law, when the perpetration of them invade the rights of others will be nuisances per se, but other acts in their nature may not be nuisances but may become by their location, situation, surroundings, or the method in which the acts are given utterance, or the manner in which a business or performance is conducted. A thing which is at all times and under any set of circumstances a violation of the rights of others is a nuisance per se. In other cases certain facts might create a nuisance, but about which honest differences might exist. 20 R.C.L. §§ 1 to 6, inclusive."

In sustaining the Ordinance of the City of Fort Worth declaring the presence of fireworks within the City a nuisance and declaring unlawful the using, storing, manufacturing, or transporting of fireworks of any description, Trueheart v. Parker, supra, was quoted with approval by the Ft. Worth Court of Civil Appeals in Stoughton v. City of Fort Worth, supra, and Parker v. City of Fort Worth, 281 S.W.2d 721 (1955).

In City of Fort Worth v. Atlas Enterprises, 311 S.W.2d 922, Tex. Civ. App., Fort Worth 1958, ref., n.r.e., the same Court held that the transport of fireworks in interstate or intrastate commerce was not a nuisance in that there was no evidence that the prohibition of such activity would preserve the health, safety, comfort or welfare of any citizen of the City and upon the additional grounds that the part of the ordinance in question conflicted with certain general laws of the State of Texas and with the Commerce Clause of the United States Constitution, Art. 1, § 8, Cl. 3. In its opinion the Court said:

"There is no question about the authority to enact the ordinance falling within the police power. In so far as the

ordinace operates as a legitimate exercise of the police power it is to be upheld. Such an ordinance can, ordinarily, absolutely prohibit a use which is a nuisance, for that is a legitimate object of the City's jurisdiction in such respect. However, if it is not in fact a nuisance it cannot be effectively declared to be one by ordinance (see authorities cited in the case of Parker v. City of Fort Worth, supra) and the City's authority in respect to it is limited to that of reasonable regulation to the extent of the requirements of necessity, for it cannot be prohibited.

"Upon the matter of the power of a municipal corporation to declare and define nuisances, it is noticed in McQuillin, Municipal Corporations, 3rd Ed., sec. 24.84, that classification of the subject matter may be made as follows: First, those which in their nature are nuisances per se, or are so denounced by the common law or by statute second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differenees of opinion in impartial minds. Governing bodies of municipal corporations are entitled to denounce conclusively articles and acts falling within the first and third classifications, but as to those falling within the second clasification the prevailing judicial view is that the power possessed is only to declare such of them to be nuisances as are in fact so.

". . . .

"A business authorized or regulated by state statute cannot be prohibited by city ordinance, and ordinances which are in conflict therewith on the same subject are

necessarily void. Murphy v. Wright, Tex. Civ. App., Fort Worth 1938, 115 S.W.2d 448. . . ."

In each of these cases the City of Fort Worth was seeking to enforce its ordinance by injunction. The Court of Civil Appeals held, in the Atlas case, that the portion of the ordinance declaring the presence of fireworks within the city a nuisance was void and ineffective. The court deciding Atlas held that "fireworks in their nature (and irrespective of quantity) are not nuisances but may become so by reason of their locality, surroundings, or the manner in which they may be handled or manipulated," and, therefore, the question of nuisance should be determined by applying McQuillin's second classification. We are inclined to the view that there may be an honest difference of opinion in impartial minds as to whether or not all fireworks by nature are nuisances.

In this case appellant seeks to enjoin the City and certain of its officials from summarily seizing and destroying fireworks which it stores within the City. By the ordinance in question the Fire Marshal is required to seize and destroy any fireworks found in the City in violation of this article. The storage of fireworks within the City constitutes a violation of the article. The cases previously discussed demonstrate that the City was acting within the power granted by the Constitution and laws of the State in prohibiting the storage of fireworks within the City. Threadgill v. State, supra. The City, therefore, was also acting within its powers in denominating the presence of fireworks within the City in violation of the Ordinance a nuisance and providing for its summary abatement. Skipper-Bivens Oil Co. v. State, 115 S.W.2d 1016, Tex. Civ. App., Austin 1938, writ ref.; Sportatorium, Inc. v. State,

104 S.W.2d 912, Tex. Civ. App., Dallas 1937, writ dism.; State ex rel Shook v. All Texas Racing Ass'n, 97 S.W.2d 669, Tex. Sup. 1936; Jenkins v. City of Waxahachie, 392 S.W.2d 482, Tex. Civ. App., Waco 1965, ref., n.r.e.

Appellant has pointed out that the cases upholding the validity of ordinances prohibiting the storage and sale of fireworks were decided prior to the enactment of Art. 1725, V.A.P.C., which prohibits the sale or use of all fireworks within the State of Texas except ICC Class C Common Fireworks. By this Act manufacturers, distributors, jobbers, and retailers of permissible fireworks were licensed, and the sale, possession, and methods of storage of such fireworks were regulated.

Appellant asserts that since he is licensed as a fireworks distributor and stores his fireworks at a place which meets the requirements and specifications recommended by the State Fire Marshal, the State of Texas has determined that his business is a lawful one so that the ordinance in question conflicts with a general State law and is, therefore, ineffective.

". . . . no ordinance of a city operating under a home rule charter can contain any provision inconsistent with our Constitution, or the general laws of this State." Berry v. City of Fort Worth, 132 Tex. 599, 124 S.W.2d 842 (1939).

In City of Fort Worth v. McDonald, 293 S.W.2d 256, Tex. Civ. App., Fort Worth 1956, ref., n.r.e., the Court upheld a temporary injunction preventing the enforcement of a city ordinance declaring pinball machines or marble boards nuisances per se and their ownership, operation or exhibition a misdemeanor on the ground that such an

ordinance was inconsistent with a statute levying occupation taxes on owners of skill or pleasure coin-operated machines, including marble machines. The Court said:

"From time to time, Texas courts have held that municipalities have no power to prohibit pursuit of occupations regulated by State law. Chronologically cited, the following decisions are in point: Ex parte Powell, 1902, 43 Tex. Cr. R. 391, 66 S.W. 298; Ex parte Ogden, 1902, 43 Tex. Cr. R. 531, 66 S.W. 1100; Ex parte Goldburg, 1918, 82 Tex. Cr. R. 475, 200 S.W. 386; Bielecki v. City of Port Arthur, Tex. Com. App., 1929, 12 S.W.2d 976; Murphy v. Wright, Tex. Civ. App., Fort Worth, 1938, 115 S.W.2d 448; Berry v. City of Fort Worth, 1939, 132 Tex. 599, 124 S.W.2d 842. All except the last involved conflict of the municipal ordinance with a revenue statute, as does this case."

Art. 1725, V.A.P.C., is clearly a regulatory as well as a licensing Act and the ordinance of the City of Houston would clearly be inconsistent therewith except for the provisions of Sec. 14 thereof reading:

"Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be construed to limit or restrict the powers of cities, towns or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further regulations on fireworks; and

provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned Title shall remain in full force and effect until thereafter amended by such city."

The provision that this Act should not be construed to limit or restrict the power of cities granted by Title 28, R.C.S., to enact ordinances prohibiting fireworks and preserving ordinances previously enacted by any city under the authority of Title 28, R.C.S., prevents the application of the rule of Berry v. Fort Worth, and City of Fort Worth v. McDonald, supra, to the ordinance in question.

The judgment of the trial court is affirmed, Associate Justice Werlein not sitting.

/s/ Tom F. Coleman,
Associate Justice.

Judgment rendered, and opinion filed January 26, 1967.

APPENDIX "B"

WRIT OF INJUNCTION

THE STATE OF TEXAS

TO:

LOUIS WELCH, Mayor of the City of Houston;

W. O. HUNTER, Fire Chief of the City of Houston; and

R. C. BREDEHOEFT, Fire Marshal of the City of Houston,

GREETING:

WHEREAS, on the 19th day of July, A.D. 1967, in Cause No. 15,016, wherein ALPHA ENTERPRISES, INC., a corporation, is Appellant, and the CITY OF HOUSTON, W. O. HUNTER, Fire Chief of the City of Houston, and R. C. BREDEHOEFT, Fire Marshal of the City of Houston, are Appellees, on the docket of the Court of Civil Appeals for the First Supreme Judicial District at Houston, Texas, an order was entered against the said City of Houston, Texas, W. O. Hunter and R. C. Bredehoeft, for an injunction in favor of the Appellant, Alpha Enterprises, Inc., as follows:

> "It is ordered that Appellant's Motion to Stay the issuance of this Court's mandate and to continue in effect its injunction previously entered on November 4, 1966, of record in Minute Book 14, Page 584,

be granted; such injunction providing in part as follows:

> " 'The City of Houston, Texas, the Fire Marshal, R. C. Bredehoeft, and Fire Chief, W. O. Hunter, of the City of Houston, Texas, and such other persons in active concert or participation with them in the enforcement of that portion of Ordinance No. 8941 codified as Article IV, Section 15-66 Code of Ordinances, City of Houston, Texas, be and they are hereby, commanded to desist and refrain from seizing, confiscating or destroying the fireworks possessed and stored by the Appellant, ALPHA ENTERPRISES, INC., at 12514 Gulf Freeway, Houston, Texas, for alleged violating Ordinance No. 8941, codified as Article IV, Section 15-66, Code of Ordinances, City of Houston, Texas, by keeping, storing, or transporting fireworks within the territorial limits of the City of Houston, Texas, . . ."

Said injunction and stay order to remain in effect until such time as Appellant may file its petition for Writ of Certiorari with the Supreme Court of the United States and until such time as said petition has been acted on by the United States Supreme Court; and the Clerk of this Court is herewith directed not to issue this Court's mandate until such time as said application for Writ of Certiorari has been finally disposed of by the United States Supreme Court.

THE STATE OF TEXAS §
COUNTY OF HARRIS §

I, ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas, do hereby certify that the above and foregoing is a true and correct copy of order in Cause No. 15,016,

entitled ALPHA ENTERPRISES, INC., Appellant, vs. CITY OF HOUSTON, ET AL., Appellees, as the same appears of record in my office in Minute Book 15, at Page 13, of the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas.

GIVEN UNDER MY HAND AND THE SEAL OF SAID COURT, at office in Houston, Texas, this the 19th day of July, A.D. 1967.

ROLA HAMM, Clerk
Court of Civil Appeals for the
First Supreme Judicial District
of Texas at Houston, Texas

By MARIBELLE REICH
Deputy

(Seal)

AND, WHEREAS, under the law as made and provided for in Article 1823, Vernon's Annotated Civil Statutes of Texas, a bond is not required as a basis for the issuance of this injunction.

NOW, THEREFORE, you, Louie Welch, Mayor of the City of Houston, Texas, W. O. Hunter, Fire Chief of the City of Houston, and R. C. Bredehoeft, Fire Marshal of the City of Houston, and each of you, and all parties in active concert or participation with them, are hereby commanded to desist and refrain in accordance with the copy of the order of the Court hereto made and attached.

WITNESS: ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, Texas.

Given under my hand and seal of said Court at office in Houston, Texas, on this the 19th day of July, A.D. 1967.

ROLA HAMM, Clerk
Court of Civil Appeals for the
First Supreme Judicial District
of Texas at Houston, Texas

By MARIBELLE REICH
Deputy

(Seal)

APPENDIX "C"

CONSTITUTION OF UNITED STATES OF AMERICA

Article 1, Section 8, Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

PENAL CODE

Art. 1725. Regulation and offenses as to fireworks.

Definitions

Section 1. As used in this Act the following terms, unless otherwise clearly indicated by the context, shall have the meanings specified below:

"ICC-Class C Common Fireworks"—Those fireworks specifically defined in Section 2 of this Act and not otherwise;

"Manufacturer" — Persons, firms, corporations or association that are engaged in the making of fireworks;

"Distributor"—Those who sell fireworks to retailers or to jobbers for resale to others;

"Jobbers"—Those who purchase fireworks for resale to retailers only;

"Retailers"—Those who purchase fireworks for resale to consumers only;

"Chief Fire Prevention Officer"—The chief of the fire department, if in a city that has a fire chief, or if in the county, the chief fire enforcement officer primarily responsible in the county for the enforcement of fire prevention acts whether same be the sheriff, the constable or any other local enforcement officer;

"Public Display" — The igniting and shooting of fireworks for public amusement for a fee;

"State Fire Marshal"—The chief law enforcement officer of the State of Texas charged with the responsibility of fire prevention;

"Importer"—Those who import fireworks from a foreign country for sale to distributors, jobbers or retailers within the State of Texas;

"Salesmen"—An individual employed by a factory, distributor or jobber who takes orders for fireworks from distributors, jobbers or retailers;

"Class A Fireworks"—Those fireworks defined in Section 10 of this Act and not otherwise;

"Class B Fireworks"—Shall include all types of dangerous fireworks excepting fireworks designated as ICC Class C Common Fireworks and Class A Fireworks.

Possession for sale or sale; permissible fireworks

Sec. 2. It shall be unlawful for any individual, firm, partnership, corporation or association to possess for sale within the state, sell or offer for sale, at retail, or use, within the State of Texas, any fireworks other than the permissible fireworks herein enumerated.

Permissible fireworks, as that term is used in this Act, shall be understood to mean ICC Class C Common Fireworks only and shall include only those fireworks enumerated as ICC Class C Common Fireworks in the regulations of the Interstate Commerce Commission, as said regulations are presently constructed, for the transportation of explosives and other dangerous articles and, more specifically, shall include and be limited to the following:

(1) Roman Candles, total pyrotechnic composition not to exceed twenty grams each in weight. (10 ball);

(2) Sky Rockets, with sticks, total pyrotechnic composition not to exceed twenty grams each in weight (6 oz.). The rocket sticks must be securely fastened to the casing;

(3) Helicopter Type Rockets, total pyrotechnic composition not to exceed twenty grams each in weight;

(4) Cylindrical Fountains, total pyrotechnic composition not to exceed seventy-five grams each in weight. The inside tube diameter shall not exceed 3/4 inch;

(5) Cone Foundations, total pyrotechnic composition not to exceed fifty grams each in weight;

(6) Wheels, total pyrotechnic composition not to exceed sixty grams in weight, for each driver unit, but there may be any number of drivers on any one wheel. The inside bore of driver tubes shall not be over 1/2 inch;

(7) Illuminating Torches and Colored Fire in any Form, total pyrotechnic composition not to exceed one hundred grams each in weight;

(8) Sparklers and Dipped Sticks, total pyrotechnic composition not to exceed one hundred grams each in weight. Pyrotechnic composition containing any chlorate shall not exceed five grams;

(9) Mines and Shells, of which the mortar is an integral part, except those designed to produce an audible effect, total pyrotechnic composition not to exceed forty grams each in weight;

(10) Firecrackers and Salutes, with casings, the external dimensions of which do not exceed one and one-half inches in length or one quarter inch in diameter, total pyrotechnic composition not to exceed two grains each in weight;

(11) Whistles without Report, total pyrotchnic composition not to exceed forty grams each in weight.

(12) Railway fuses, other fireworks used by railroads or other transportation agencies for signal purposes or illumination, truck flares, hand ship distress signals, and illuminating torches. Total pyrotechnic composition of illuminating torches not to exceed one hundred grams each in weight;

(13) Items composed of combination of two or more articles or devices of the above enumerated approved items.

Retail sales prohibited; exceptions

Sec. 3. Be it further enacted, that no permissible articles of ICC Class C Common Fireworks enumerated in Section 2 shall be sold at retail, offered for sale at retail, or possessed for retail sale within the state, or used, in the State of Texas, unless same shall be properly identified to conform to the nomenclature of Section 2 hereof and unless it is certified as "ICC Class C Common Fireworks" on all shipping cases and by imprinting on the article or retail container, "ICC Class C Common Fireworks," with the exception of whistles without report, such imprint to be of sufficient size and placement as to be readily recognized by law enforcement authorities and the general public. Each manufacturer shall submit samples of all items to the State Fire Marshal for approval.

Exceptions from act

Sec. 4. Be it further enacted, that there shall not be affected by this Act the following:

Toy pistols, toy canes, toy guns or similar devices in which paper caps containing twenty-five one-hundredths (25/100ths) grains or less of explosive compounds are used, provided they are so constructed that the hand cannot come in contact with the cap when in place for exploding, and toy paper pistol caps which contain less than twenty-five one-hundredths (25/100ths) grains of explosive compounds, the sale and use of which shall be permitted at all times.

License Fees

Sec. 5. A. A license fee of $500.00 per year, due and payable on or before February 1st of each and

every year beginning February 1, 1958, to the State Fire Marshal subject to the provisions of Section 12 of this Act, will be charged for the permit to manufacture, possesses and sell fireworks. The manufacturer may mannufacture, possess and sell items other than those enumerated in Section 2, but for sale and delivery only to states where other types of fireworks are legal but may not be sold or used in the State of Texas.

The same license fee will apply to and shall be paid by any and all out-of-state manufacturer offering goods for sale in the State of Texas, as a condition to their sale in Texas.

B. A similar license fee of $750.00 annually, due and payable on February 1st of each and every year, as provided in Section 5A above, will be charged all distributors who possess and sell the fireworks enumerated in Section 2.

The license fee provided herein shall be due and payable by all out-of-state distributors offering goods for sale within the State of Texas.

C. A license fee, due and payable as provided in Section 5A above, of $500.00 per year, will be charged all jobbers who possess and sell the fireworks enumerated in Section 2.

The license fee provided herein shall apply to and be payable by out-of-state jobbers as a condition for selling within the State of Texas.

D. An annual license fee of Two Dollars ($2.00) will be charged all retailers who possess and sell fireworks enumerated in Section 2, for which an annual retailer's license shall be issued effective until midnight of the following 31st day of January. No person, firm or corporation shall offer fireworks for sale to individuals at retail before the 24th day of June and after the 4th day of July, or the 15th day of December of each year and after midnight of the 1st

day of January of the following year. As amended Acts 1963, 58th Leg., p. 1103, ch. 429, § 1.

Effective January 1, 1964.

E. An annual license fee, due and payable as provided in Section 5A above, of $100.00, shall be due and payable by each importer who possesses and sells the fireworks enumerated in Section 2 above to any persons, firms, corporation or association within the State of Texas.

F. An annual license fee of $10.00, due and payable as provided in Section 5D above, shall be due and payable by all salesmen who take orders for the sale of fireworks enumerated in Section 2 above and all salesmen are prohibited from taking orders from any firm, individual, corporation, association or partnership not licensed and each order for the sale of fireworks taken must reflect the license number of the purchaser. Furthermore, salesmen are prohibited from possessing any fireworks described in Section 2.

G. The license fees provided above shall be due and payable by each retailer annually and for each separate place of business maintained.

H. A license fee of $5.00 for each public display shall be paid at the time of obtaining the permit, as hereafter provided, being payable to and in the manner provided and prescribed in Section 5A.

I. No person, firm, corporation or association shall deliver fireworks for resale to any individual, firm, corporation or association unless consignee produces a license or evidence that consignee holds such a license.

J. No distributor, jobber or retailer shall purchase fireworks from a factory, distributor, jobber, manufacturer or salesman without first requiring proof that the license required of each herein has been obtained. No license provided for hereinabove shall be transferable nor shall a jobber or salesman be permitted to operate under a license granted to a distributor.

K. For the violation of any of the provisions of this Act, the license granted shall be revoked by order of the State Fire Marshal evidenced by a written notice of revocation furnished directly to the licensee and a copy thereof filed in the county or counties in which the licensee does business. Said notice of revocation shall set out the grounds for revocation and any licensee aggrieved thereby may, within ten (10) days from receipt of said notice, appeal from the decision of revocation to the District Court of Travis County, Texas, in which case the trial to determine the justification for said revocation shall be a trial de novo.

Licenses not issued, when

Sec. 6. No license, as provided in Section 5, shall be issued for either a manufacturer, a distributor, a jobber or a retailer unless the place of manufacture, or in case of a distributor, a jobber or a retailer, the place of storage of said fireworks, shall meet the requirements and specifications recommended from time to time by the State Fire Marshal.

Storing, locating, or display of fireworks; safety measures

Sec. 7. Be it further enacted, the placing, storing, locating, or displaying of fireworks in any window where the sun may shine through glass on the fireworks so displayed or to permit the presence of lighted cigars, cigarettes, or pipes within ten (10) feet of where the fireworks are offered for sale, is hereby declared, unlawful and prohibited. Fireworks offered for retail sale must be protected from direct contact with the public at all times. Fireworks shall not be sold at retail or displayed to the public within any building or portion thereof or any vehicle which allows for entry any persons other than employees within such building or vehicle unless such fireworks are kept where they cannot be reached or handled by

such persons. At all places where fireworks are stored or sold, there must be posted signs with the words "Fireworks—No Smoking" in letters not less than four (4) inches high. No fireworks are to be sold at retail at any location where paints, oils, or varnishes are kept for use or sale, unless such paints, oils and varnishes are kept in the original unbroken containers, nor where resin, turpentine, gasoline, or other inflammable substance which may generate inflammable vapor is used, stored, or sold, or where the licensing authority or any police, fire or regulatory body having direct supervision over the establishment shall determine that any condition exists which makes the sale of fireworks at such location unusually hazardous.

Sale to children under ten years of age, intoxicated or irresponsible persons; throwing from or into motor vehicle

Sec. 8. Be it further enacted, that it shall be unlawful to offer for retail sale or to sell any fireworks to children under the age of ten (10) years or to any intoxicated or irresponsible persons. It shall be unlawful to explode or ignite fireworks within six hundred (600) feet of any church, hospital, asylum, public school, or within one hundred (100) feet of where fireworks are stored, sold, or offered for sale. No person shall ignite or discharge any permissible articles of fireworks within or throw the same from a motor vehicle while within, nor shall any person place or throw any ignited article of fireworks into or at such a motor vehicle.

Manufacturing, possessing or selling; permit

Sec. 9. Be it further enacted, that no person, firm, corporation or association, without securing a permit from the State Fire Marshal, shall manufacture, possess or sell any dangerous fireworks for any use or purpose, including agricultural purposes or wild life

control. Before any dangerous fireworks may be manufactured, possessed, sold or used, a permit therefor specifying the uses to be made thereof must be secured from the State Fire Marshal. Any permittee, whether governmental agency or commercial manufacturer, which distributes or sells at wholesale or retail agricultural or wild life fireworks shall require good and sufficient proof of the lawful intended use of such fireworks by the purchaser. The purchaser shall be required to exhibit the permit obtained from the State Fire Marshal as a condition to such purchase; a true copy of such permit and records specifying the uses to be made shall be given to the purchaser and only thereafter shall the purchaser be permitted to use the fireworks in the manner designated in the permit. Each such permit shall be good only for the specific purposes stated therein and for the time designated therein and at the end thereof shall be surrendered to the State Fire Marshal. The State Fire Marshal shall be paid $1.00 for each such permit.

Class A fireworks; display, etc.; application for permit; surety bond

Sec. 10. Be it further enacted, that "Class A Fireworks," as used in this part, shall include the following:

Colored bomb shells over 15 inches in circumference or consisting of more than one break;

Detonating shells, also known as aerial bombs, over nine inches in circumference or consisting of more than one break;

Ground bombardments, also known as detonating reports, of all sizes which explode on the ground;

Such other fireworks which may be designated for such classification by the State Fire Marshal.

Any adult person or any firm, copartnership, corporation or association planning to make a public display of fireworks shall first make written application for a permit to the chief of the fire department or the chief fire prevention officer of the city or county in which the display is to be held, or to the State Fire Marshal, or to such authorized deputy as he may designate for such purpose if there be no chief of the fire department or chief fire prevention officer in the area, at least 24 hours in advance of the date of the proposed display.

It shall be the duty of the officer to whom the application for a permit is made to make an investigation as to whether such a display as proposed shall be of such a character and so located that it may be hazardous to property or dangerous to any person, and he shall in the exercise of reasonable discretion grant or deny the application, subject to such reasonable conditions, if any, as he may prescribe.

The applicant for such display permit shall at the time of application furnish proof that he carries compensation insurance for his employees as provided by the laws of this state, and he shall file with the officer to whom the application is made, a bond issued by an authorized surety company to be approved by such officer, conditioned upon the applicant's payment of all damages to persons or property which shall or may result from or be caused by such public display of fireworks, or any negligence on the part of the applicant, or his or its agents, servants, employees, or subcontractors in the presentation thereof, or a certificate evidencing the carrying of appropriate public liability insurance issued by an insurance carrier authorized to transact business in this state for the benefit of the person named therein as assured, as evidence of ability to respond in damages in at least such amount, said policies to be similarly approved. If the permit is granted, the sale, possession, and use of fireworks for public display is lawful for that purpose only. No permit granted is transferable.

In the case of an applicant for a permit to display Class A fireworks, or a combination of Class A and Class B fireworks, the amount of such a surety bond shall not be less than Ten Thousand Dollars ($10,000.00); and the amount of such insurance shall be not less than Twenty Thousand Dollars ($20,000.00).

In the case of an application for a permit to display Class B fireworks exclusively, the amount of the surety bond shall be not less than One Thousand Dollars ($1,000.00), and the amount of the insurance shall be not less than Five Thousand Dollars ($5,000.00). Provided, that in lieu of filing a surety bond, an applicant for such a Class B permit may file a bond in the sum of at least One Thousand Dollars ($1,000.00) with at least two good and sufficient sureties, subject to like conditions and to the approval of the officer issuing the permit.

Every public display of fireworks which includes in whole or in part "Class A Fireworks" shall be handled or supervised by a competent and experienced pyrotechnic operator approved by the chief of the fire department or the chief fire prevention officer of the city or county in which the display is to be held, or by the State Fire Marshal or his authorized deputy therefor, if there be no chief of the fire department or chief fire prevention officer in the area.

Public display of "Class B Fireworks" may be supervised or handled by any competent adult person approved by the officer issuing the permit.

The State Fire Marshal shall adopt reasonable rules and regulations not inconsistent with the provisions of this part, for the granting of permits for, and the presentation of, public displays of fireworks.

All public displays of fireworks shall be of such a character and so located, discharged, or fired as not to be hazardous or dangerous to persons or property.

Notwithstanding the provisions of this part, any adult person, or any firm, corporation, or copartnership may secure a general license for the public display of fireworks within the State of Texas, subject to the provisions of this part relative to the securing of local permits for displaying of fireworks in any city or county, excepting that in lieu of filing such bonds or certificate of public liability insurance as hereinabove provided in this part, a surety bond similarly conditioned in the amount of Twenty-five Thousand Dollars ($25,000.00) or a certificate evidencing public liability insurance in a like amount shall be filed with the State Fire Marshal, who shall have the authority to issue such licenses, subject to such reasonable rules and regulations, not inconsistent herewith, which he may adopt. A certificate evidencing such general license, when so obtained, shall be filed with the legislative body or officer granting a permit for the display of fireworks prior to the issuance thereof.

No permit shall be granted for the discharge of dangerous fireworks except in connection with public display of fireworks.

No person shall transport, convey or deliver any dangerous fireworks except for permittees making delivery to any other permittees, or to locations of public displays of fireworks authorized hereunder or to distributors outside of this state.

For purposes of license the sale and/or possession of "Class A" and "Class B" fireworks only, as described herein, shall require a Distributor's permit.

Violations as misdemeanors; punishment

Sec. 11. Be it further enacted, that any individual, firm, partnership, or corporation that violates any provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than One Thousand Dollars ($1,-

000.00), or imprisoned for not more than one (1) year, or both, in the discretion of the court or jury.

License fees; disposition of proceeds

Sec. 12. Be it further enacted, that all moneys derived from the license fees provided in Section 5 of this Act shall be paid into the State Treasury by the State Fire Marshal for safe keeping and shall by the State Treasurer be placed in a separate fund to be made available in such amounts as may be appropriated by the Legislature for the use of the State Fire Marshal in the administration of this Act and upon requisition by the State Fire Marshal. All such moneys so paid into the State Treasury and thus appropriated may be used by the State Fire Marshal for salaries and expenses of all persons employed for the administration and enforcement of this Act including all necessary travel expenses of the State Fire Marshal, or any assistant or appointee, and the Attorney General or persons authorized to act for either, when performing duties hereunder.

On January 1st of each year the unused portion of said funds in said special account for the past fiscal year shall be paid over and become a part of the general revenue fund.

Partial invalidity

Sec. 13. Be it further enacted, if any portion of this Act be held unconstitutional, such holding shall not invalidate the remainder thereof.

Repealer

Sec. 14. Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks

within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be construed to limit or restrict the powers of cities, towns, or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned Title shall remain in full force and effect until thereafter amended by such city.

Effective date

Sec. 15. Be it further enacted, that this Act shall be and become effective on February 1st next from and after the passage of this Act, and any and all fireworks other than those defined in Section 2 above in the possession of any manufacturer, distributor, jobber, or retailer for use in the State of Texas from and after the effective date of this Act shall be considered as a violation hereof and such persons, firms, corporations or associations shall be subject to the penalties herein provided.

Emergency Clause

Sec. 16. The fact that there exists no adequate or effective regulatory laws governing the manufacture, sale and use of fireworks in the State of Texas, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended; and said Rule is hereby suspended, and this Act shall take effect and be in force as of the date specified in Section 15 above, and be it so enacted.

APPENDIX "E"

CODE OF ORDINANCES
CITY OF HOUSTON, TEXAS
SECTION 15-66

"The presence of any fireworks within the jurisdiction of the City in violation of this Article is hereby declared to be a common and public nuisance. The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this Article and any member of the Fire Prevention Division of the Fire Department of the City, or any police officer of the City, or any other duly constituted peace officer, is empowered to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the Fire Marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section."

APPENDIX "F"

TESTIMONY OF A. M. COHEN, PRESIDENT AND GENERAL MANAGER OF ALPHA ENTERPRISES, INC., REGARDING THE INTERSTATE PHASE OF PETITIONER'S BUSINESS

On direct examination by Mr. Werlein (S.F. 18-19)

Q. How long has it been since you manufactured pistol caps?
A. About five to six years.
Q. What do you manufacture on the premises now?
A. Nothing whatsoever.
Q. You do not manufacture any fireworks?
A. No, sir.
Q. Where do the fireworks come from?
A. They are purchased from various sources and shipped in to me.
Q. Are they shipped from out of state?
A. Yes, sir, they are.
Q. In connection with your business, do you in turn in some cases ship them out to other states?
A. Yes, sir, I do.
Q. Where do you do your business?
A. We are engaged mostly in the southwest area.
Q. And as an example, the fireworks that you may get from Japan, do they come packaged?
A. Yes, sir, they do.
Q. Do they come in a case, the packages in a case?
A. Yes, sir.
Q. And those going out of the state of Texas, is that case broken before they are shipped out of state?

A. No, they are shipped in full case lots.

Q. Then the fireworks that are imported from other states in the United States, are they also in packages and in cases?

A. Yes, sir, they are.

Q. And where you are acting as a distributor, say for New Mexico, for example, when they are sent out there are those packages broken here?

A. No, it is sent in cases.

APPENDIX "G"

TESTIMONY OF A. M. COHEN, PRESIDENT AND GENERAL MANAGER OF ALPHA ENTERPRISES, INC., REGARDING THE TAKING OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS

On direct examination by Mr. Werlein (S.F. 22-23)

Q. Now, is Alpha Enterprises a corporation engaged in the fireworks business?

A. Yes, sir.

Q. From which it obtains its only income?

A. Yes, sir.

Q. And without the sale of fireworks is there any income?

A. There is none.

Q. What is the monthly mortgage payments, what are they?

A. Well, I would have to give you an approximation because there are taxes that we pay separately, but the mortgage is over $800 per month, closer to $900, and the taxes on top of that.

Q. In the event that the City is successful in this suit and Alpha Enterprises is prohibited from storing fireworks at this location, would the Plaintiff suffer a loss herein?

A. Very definitely.

Q. Is there a possibility that Alpha Enterprises would lose the property if they were not able to pay the mortgage?

A. Well, I do not think there would be any way to pay it.

Q. Is there any place in the state of Texas where these fireworks could be moved?

A. No, sir

Q. Do you know any place where they could be moved at this time?

A. No, sir.

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IN THE

Supreme Court of the United States

October Term, 1967

ALPHA ENTERPRISES, INC., *Petitioner*

v.

CITY OF HOUSTON, ET AL., *Respondents*

BRIEF OF RESPONDENTS
In Opposition To Petition For Writ of Certiorari

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IN THE

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October Term, 1967

ALPHA ENTERPRISES, INC., *Petitioner*

v.

CITY OF HOUSTON, ET AL., *Respondents*

BRIEF OF RESPONDENTS
In Opposition To Petition For Writ of Certiorari

Respondents, City of Houston, Texas, W. O. Hunter, Fire Chief of the City of Houston, and R. C. Bredehoeft, Fire Marshal of the City of Houston, file this opposition to the Petition for Writ of Certiorari filed by Petitioner to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTION PRESENTED

Respondents submit that there is but one question here presented:

I.

In 1953, there was an explosion of a warehouse storing fireworks within the City of Houston, Texas, resulting

in four deaths, ninety-six injuries, and untold property damage. Shortly thereafter, and in response thereto, the City Council of the City of Houston enacted its Ordinance §8941 which prohibited the storage of fireworks within the City of Houston. Is this ordinance unconstitutional?

STATEMENT OF THE CASE

On June 5, 1953, the warehouse of Alco Fireworks & Specialty Co., situated on Rosine Street, Houston, Texas, blew up. The force of the explosion caused a house in the neighborhood to be demolished, killing the two adults and two children who were in it. Ninety-six other persons suffered injuries of varying degree. Several blocks around the warehouse were flattened.[1]

An investigation was immediately instituted by Hon. Roy Hofheinz, then Mayor of the City of Houston, and as a result of the investigation it was determined that the holocaust was caused by the explosion of fireworks in the Alco Fireworks & Specialty Co. warehouse. As a result, the ordinance [City of Houston Ordinance §8941] whose constitutionality is here attacked was enacted.

---

1. The sound of the explosion was reported to have been heard as far as fifteen miles away. Immediately after the explosion, a mushroom shaped cloud of white smoke rose above the scene, and within about two minutes black smoke began to rise and mix with the white cloud. Sky rockets and flares caused numerous flashes of fire within the cloud, and people nearby could hear the continuous popping of fireworks. Damage was consistently heavy to all but the strongest structures within a radius of almost one-fourth mile from "ground zero". Thirty houses were damaged beyond repair. At least one building a distance of one-half mile received major structural damage. A Sears-Roebuck Co. warehouse received major structural damage to the walls facing the point of the explosion. Many Houston residents thought that an atomic bomb had exploded. Lewis M. Killiar, National Academy of Sciences, Committee on Disaster Studies, Disaster Study No. 2, Pub. No. 391, *A Study of Response to the Houston, Texas, Fireworks Explosion.*

Appendix "A", pages 19-22, infra, contains the testimony of Mr. Alcus Greer, then and now an arson investigator of the City of Houston fire department. This testimony is to the effect that the fire department investigation determined the tragedy was caused by the explosion of fireworks in the warehouse, Appendix "B", pages 23-26, infra, contains the testimony of Hon. Will G. Sears, who was City Attorney in 1953. Mr. Sears described the devastation he found on the scene and also testified that as City Attorney he was directed by the Mayor to draft Ordinance §8941, and that said Ordinance was passed by the City Council of the City of Houston as a result of the explosion.

ARGUMENT

I.

The enforcement of City of Houston Ordinance §8941, prohibiting the storage of fireworks within its corporate limits, would not be an unconstitutional interference with interstate commerce.

The City of Houston, the most populous city in Texas, and the sixth largest in the nation, after having been subjected to a holocaust in which four of its citizens were killed outright, and ninety-six others were injured as a result of an explosion of a fireworks warehouse, passed an ordinance forbidding the storage of fireworks within its corporate limits. As the fireworks were imported from out of state, and as some of them were later sold and shipped out of state, Petitioner has taken the position that the enforcement of this ordinance would constitute an unconstitutional interference with Interstate Commerce. This position is untenable.

In 1951, in *Breard v. City of Alexandria,* 341 U.S. 813 (1951), the United States Supreme Court repeated the fundamental proposition of constitutional law that:

> "Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power." 341 U.S. 634.

And, in 1960, in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), holding a city ordinance valid which was aimed at air pollution, the United States Supreme Court stated:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . .' never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country . . ." 362 U.S. 443.

Thus, local regulations are allowed to stand if they are not an unreasonable burden upon interstate commerce and the local nature of the activity and the obvious state or local interest outweighs the national interest as envisioned by the commerce clause of the United States Constitution.

The question raised here was resolved in *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (1919). In that case the United States Supreme Court was required to determine the validity of a municipal ordinance forbidding

the storage of petroleum, gasoline, etc. within three hundred feet of any dwelling house. The plaintiff oil company, much like the Petitioner here, contended that the tanks were necessary for its business and that it "knows of no available place in the city where the tanks could be put and oil stored without violating the ordinance, . . . and that the enforcement of it will deprive the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States."

The United States Supreme Court, speaking through Mr. Justice Holmes, held:

> ". . . A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States . . . The power 'is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good . . ." 248 U.S. 498.

A similar question was before the Illinois Appellate Court in *Edward R. Bacon Grain Co. v. City of Chicago*, 59 N.E.2d 689 (Ill. App. 1945), where the Court was called upon to determine the validity of a City of Chicago ordinance regulating grain storage elevators which was enacted by the City "as a protection against the extra fire and explosion hazard arising from the operation of a grain elevator due to dust explosions . . ." Refusing to agree that this ordinance was a burden on interstate commerce and thus unconstitutional, the Illinois Court said:

> ". . . The principle is thoroughly established that the exercise by the state of its police power, which would

be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

* * * *

". . . The federal control of interstate commerce does not preclude local police regulations covering matters as to which Congress has not acted, . . . it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress . . . *The ordinance before us is a police regulation of strictly a local character, intended to protect the city, its people and property from fire and explosion arising out of the maintenance and operation of warehouses.* It applies alike to all warehouse operators, whether engaged in intrastate or interstate commerce. *It is not in conflict with the commerce clause of the constitution or any federal legislation or regulation.* (Emphasis added). 59 N.E.2d 693-694.

Petitioner has asserted that the case of *City of Fort Worth v. Atlas Enterprises*, 311 S.W.2d 922 (Tex. Civ. App. 1958, error ref. n.r.e.), is authority for the proposition that the Texas Courts hold a City Ordinance such as that challenged by this petition is an unconstitutional burden on Interstate Commerce. This is not a correct interpretation of that case which dealt with a Fort Worth ordinance prohibiting the storage, use, and *transportation* of fireworks within the City of Fort Worth. Atlas Enterprises, in the course of interstate commerce, transported fireworks from without the city, *through the city*, to points beyond. The narrow question presented, therefore, was whether *transportation* could be prohibited. The Fort

Worth Court of Civil Appeals distinguished *Atlas* from its previous holding in *Stoughton v. City of Fort Worth*, 277 S.W.2d 150 (Civ. App. 1955), by pointing out that *Stoughton* went no further than to hold valid the portion of the ordinance prohibiting *storage* within the City of Fort Worth.

Although thus furnished with the opportunity to do so, the Court did not overrule *Stoughton*, but held "the judgment must be affirmed in any event due to the invalidity of the ordinance in so far as it purports to prohibit the *movement* of fireworks in intrastate and interstate commerce."

In *Atlas* the Court further pointed out that "Though challenged, the City produced no evidence in demonstration of any prior injury resultant to either its own citizens or their property, or to citizens of other municipalities or their property through such *transport*." (Emphasis added). In the case at bar, we are concerned with the question of *storage* as opposed to *transportation* and the record contains evidence of an explosion of fireworks, stored within the City of Houston by the very same man who now owns and controls Petitioner corporation, in which explosion *four citizens of Houston were killed, ninety-six injured*, and an untold amount of property was damaged and destroyed. Thus, if *Atlas* can be construed to hold that disastrous experience is a factor to be considered in determining the validity vel non of the ordinance, Houston has that experience, recorded in blood, and now only seeks to be allowed to prevent other Houston citizens from being killed or injured in the same manner.

The rule can be easily summarized and concluded that: "Every state police statute necessarily will affect interstate

commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce." *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 351 (1939); that "Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, State action is struck down. If the activity is one of predominantly local interest, State action is sustained. More accurately, the question is whether the State interest is outweighed by a national interest in the unhampered operation of interstate commerce." *People of State of California v. Zook*, 336 U.S. 725, 728 (1949). The "local" interest here put onto the balance is the prevention of a recurrence of the 1953 holocaust. With their notorious record for maiming and blinding children, and causing destructive fires, what social, economic, or political benefits do fireworks offer to society that would justify subjecting the people of Houston to the risk involved here? What is there about the transportation of fireworks of such transcending national importance that would outweigh the rights of the people of the City of Houston herein? It is submitted there is none, and that the very incidental manner in which interstate commerce might be affected here would not take the matter out of the sphere of local control; especially is this so when it is not shown or even contended that interstate commerce, vis-a-vis intrastate commerce, is discriminated against.

Respondents submit, therefore, that City of Houston Ordinance §8941 does not impose an unlawful or unconstitutional burden on interstate commerce.

II.

The United States has not entered the field of fireworks regulation to such an extent that the City of Houston, Texas, may not lawfully enact an ordinance prohibiting the storage of fireworks within its corporate limits after four of its citizens were killed and ninety-six others were injured as a result of a fireworks warehouse explosion.

Respondent submits that the Congress has occupied the field of fireworks regulation to the limited extent of prescribing the manner in which *fireworks and other dangerous substances* may be shipped in interstate commerce, and only to that extent.

In the Code of Federal Regulations, Title 49, Ch. 1, #71-79, the rules governing the shipment and packaging of fireworks in interstate commerce are set out. They are rather limited in scope and intended effect, however, as stated by #73.1 thereof:

> "(a) To promote the uniform enforcement of law and to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles by common carriers engaged in interstate or foreign commerce, the regulations in parts 71-79 of this chapter are prescribed to define these articles for transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment by rail freight, rail express, rail baggage, highway, or by carrier by water. It is the duty of each such shipper to make the prescribed regulations effective and to thoroughly instruct employees in relation thereto."

The only other instance in which Respondents have been able to discover any Federal Action in the field of Fire-

works legislation has been in the Federal "Child Protection Act of 1966,"[2] whereby the Federal "Hazardous Substances Labeling Act"[3] was amended by adding, as Section 3 thereof, a paragraph banning as hazardous substances, toys or other articles intended for use by children which contain a hazardous substance. Fireworks are exempted from this ban only to the extent that the Secretary of Commerce "determines that such articles can be adequately labeled to protect the purchasers and users thereof," hardly an enthusiastic Congressional approval.

It is submitted that the Federal Statute and the Federal Regulations above referred to do not in any manner indicate Congressional intent to invade the field so as to prevent the City of Houston from responding to the need for action so traumatically demonstrated by the 1953 fireworks explosion and prohibiting the storage of that dangerous and explosive substance, — which serves no useful social, economic, or political purpose, — within its corporate limits.

Very analogous is *Double-Eagle Lubricants, Inc. v. The State of Texas,* 248 F. Supp. 515 (U.S.D.C., N.D., Tex. 1965). A Federal Trade Commission Regulation[4] declared it to be an unfair and deceptive practice to fail to disclose on the panel of its container the fact that a lubricating oil has been made from previously used oil. The Court held that this Regulation did not so preempt the field as to prohibit the State of Texas from enforcing its own statute[5] requiring reconditioned lubricating oil to be sold

2. Public Law 89-756, 98th Congress, S. 3298, Nov. 3, 1966.

3. 15 U.S.C.A. 1261-1273.

4. 16 Code of Federal Regulations, 406.1, et seq.

5. Art. 1106b, V.A.P.C.

in containers with such disclosure on both the front and back thereof. After reciting, as a predicate, certain fundamental principles of Constitutional law, such as the rule that preemption will not be merely presumed, Judge Hughes held:

> "Since the purpose of the Texas statutes in requiring reconditioned motor oil to be labeled as such is to protect the safety and property of the public and to prevent a deception as to the nature and quality of the product the statute is within the police power of the State. *While the law incidentally affects interstate commerce, it does not discriminate against such commerce and is reasonable in its requirements.*
>
> "It is clear that Article 1106(b) Vernon's Annotated Penal Code is a valid exercise of the state's police power, and since the Federal government has not preempted the field to the exclusion of the states, the Texas statute is valid as applied to Double-Eagle." (Emphasis Added). 248 F. Supp. 519.

If, by the wildest stretch of the imagination, Interstate Commerce shipping regulations could be classified as a license, "we are far beyond the time when, if ever, 'license' per se was a condemnation of state regulation of interstate business done within the state's borders." *Robertson v. People of State of California,* 328 U.S. 440, 458 (U.S. Sup. 1946).

It is submitted, therefore, that City of Houston Ordinance §8946 was enacted for the purpose of protecting the citizens of Houston, Texas from the dangers of explosions of fireworks stored in warehouses in this populous city, while the Federal regulations merely prescribe the methods for packaging, shipping, and classifying *"explosives and other dangerous articles,"* ergo, the Congress has

not preempted the field to the exclusion of the States and Municipalities.

III.

The threatened seizure and confiscation of Petitioner's fireworks in the event they were not removed from the City of Houston would not constitute a "taking" of property as prohibited by the Fifth Amendment of the United States Constitution.

As stated many times beforehand, the purpose of City of Houston Ordinance §8941 was to keep fireworks from being stored within the City of Houston. As an incident to the enforcement of the ordinance, *if the Petitioner did not remove the fireworks* [see page 5 of Petitioner's Petition for Writ of Certiorari], the City stated that it would exercise its rights under the ordinance to seize and destroy them. Petitioner had its option to avoid this loss by taking the explosives out of the City.

Assuming the ordinance to be valid otherwise, would it be rendered ineffective by the mere refusal of the Petitioner to remove the fireworks unless paid therefor? Would this impasse prevent the enforcement of the law? No.

It has long been settled that forfeiture of property used in violation of law is not a denial of due process or an unconstitutional "taking" of property. *Van Oster v. State of Kansas*, 272 U.S. 465 (1926); *United States v. One 1961 Cadillac Hardtop Automobile*, etc., 207 F. Supp. 693 (U.S.D.C., E.D., Tenn. 1962).

Texas law is the same. In a fireworks storage case, *Cannon v. City of Dallas*, 263 S.W.2d 288 (Tex.Civ.App. 1953, error ref. n.r.e.) it was held:

> "The distinction between cases involving right of eminent domain or where the municipal corporation appropriates property, and where the use of property is restricted or prohibited must be kept in mind. It has been held that police power permits actual destruction of property where public welfare demands. In such cases the city does not affirmatively benefit, but merely prevents or seeks to prevent some type of harm or nuisance to its citizens, and the loss by regulation or destruction does not enrich anyone, as is the case where property is taken for public use and not because it or its use offends. The power to protect by regulation cannot be and is not burdened with the duty of compensating the aggrieved."

It is submitted, therefore there has been no present or threatened violation of the Fifth Amendment to the United States Constitution.

IV.

The holding of the court below was in harmony and consistent with the statutes and case law of the State of Texas.

Some time prior to the year 1940, the City of Dallas enacted its City Ordinance §3003 which, among other things, prohibited the sale and/or possession of fireworks of any kind in the City. A conviction under this ordinance was affirmed by the Texas Court of Criminal Appeals in *Ex parte Clark*, 140 S.W.2d 854 (Tex Cr. App. 1940), which held that fireworks "constitutes a menace to the life, limb and health to the users and their associates, increases the hazard and loss by fires, and constitutes a common public nuisance, which should be prohibited by law." The Court further held: "We think this a proper exercise of its police power in thus attempting to safeguard

the security, the peace, the lives, the health and the prosperity of its inhabitants."

In *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.) the same Dallas ordinance[6] prohibiting the storage and/or sale of fireworks was upheld.

As previously recited, the City of Houston, Texas, suffered a holocaust in 1953 in which four of its citizen were killed, ninety-six wounded, and in which untold property damage and devastation was wreaked. Shortly after, *and because of,* this explosion, the City Council of the City of Houston enacted Ordinance §8941 which, inter alia, prohibited the storage of fireworks within the city. Shortly thereafter a conviction under this ordinance was upheld in *Treadgill v. State,* 275 S.W.2d 658 (Tex. Cr. App. 1954). The Court held:

> "It appears that it is now definitely settled . . . that fireworks constitute such danger to the public health and safety as to constitute them a nuisance . . ."

A City of Fort Worth ordinance prohibiting the sale and/or storage of fireworks within that city was upheld in *Stoughton v. City of Fort Worth,* 277 S.W.2d 150 (Tex. Civ. App. 1955):

> "Without doubting the power of a court to strike down a city council's definition of a nuisance when the act or condition so denounced does not tend to be injurious to public good, we may not do so when the act or condition sought to be prevented is almost if not quite universally held to be inherently dangerous and to constitute a hazard to property and 'a menace to the life, limb and health'."

This same Fort Worth ordinance was upheld in *Parker v. City of Fort Worth*, 281 S.W.2d 721 (Tex. Civ. App. 1955).

A city ordinance is presumed to be valid unless it be proved that by enacting it the governing body of the municipality was acting in an arbitrary and unreasonable manner, and clearly in abuse of its power, *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945 (Tex. Sup. 1949). Also, the burden of proving such arbitrary or capricious actions is upon the party so attacking the ordinance, *City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18 (Tex.Sup. 1948).

It goes without saying that where, less than a month before, the City of Houston had experienced a devastating, deadly, holocaust in which four of its citizens were killed, ninety-six others wounded, and where its citizens suffered millions of dollars worth of property damage, the City Council of the City of Houston did not act in an arbitrary, capricious, or fraudulent manner in seeking to prohibit a recurrence of such a tragedy by forbidding the storage of fireworks within the city. The fact that Mr. Cohen and other dealers in death, fire and destruction may lose money by the prohibition does not, in Respondents' opinion meet the burden of proof cast upon Petitioner to show that the action was arbitrary, capricious or fraudulent.

Persuasive of the fact that such action is not arbitrary, etc., is the existence of many similar ordinances in the major cities of the United States, listed in Appendix "C" of this Brief, at page 27 hereof.

Respondents submit, at this point, that the City of Houston ordinance being attacked is valid unless Art. 1725 V.A.P.C. makes it otherwise.

Petitioner contended that, although the ordinance under attack here may have been a leigitimate exercise of the police power at the time the Court of Criminal Appeals declared it to be so in *Treadgill v. State*, 275 S.W.2d 658 (Tex. Cr. App. 1954), the subsequently enacted Art. 1725, V.A.P.C. preempted the field, rendering the quondam lawful ordinance invalid. Art. 1725, V.A.P.C. is set forth in its entirety in Appendix "D" of Petitioner's Petition for Writ of Certiorari, at pages 35-48 thereof.

As in other areas of statutory construction, the Courts will not seek to find a conflict between an ordinance and a statute where one does not exist, and the two will be reconciled if it can be done wihout acting contrary to the intent of the Legislature in enacting the statute. Therefore, to determine whether there has been a preemption—whether the Legislature intended to occupy the field of fireworks regulation exclusively—the first place to start looking is the statute itself. Respondents submit that Section 14 of Art. 1725, V.A.P.C. definitely shows that not only is there no conflict, but the Legislature definitely intended for such ordinances as that under attack here to remain in full force and effect. That section is as follows:

"Repealer"

> "Sec. 14. Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be

> construed to limit or restrict the powers of cities, towns or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further, regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned Title shall remain in full force and effect until thereafter amended by such city."

We must remember that prior to the enactment of Art. 1725, V.A.P.C. which included quoted Section 14, the very ordinance under attack in the case at bar had been upheld in *Treadgill v. State,* 275 S.W.2d 658 (Tex. Civ. App. 1954), and similar ordinances of the cities of Dallas and Fort Worth were approved in *Ex Parte Clark,* 140 S.W.2d 854 (Tex. Cr. App. 1940), *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.), *Stoughton v. City of Fort Worth,* 277 S.W.2d 150 (Tex. Civ. App. 1955), and *Parker v. City of Fort Worth,* 281 S.W.2d 721 (Tex. Civ. App. 1955). "The legislature must be presumed to have been cognizant of the existing decisions," *Koy v. Schneider,* 110 Tex. 369, 221 S.W. 880 (Tex. Su[illegible]20), *Gabbert v. City of Brownwood,* 176 S.W.2d [illegible] (Tex. Civ. App. 1943, error ref). Thus, the conclusion is inescapable that the Legislature did not intend to repeal City of Houston Ordinance §8941 by Art. 1725 V.A.P.C.—else, why was Section 14 of the statute included? "If Parliament does not mean what it says, it must say so."

It is submitted, therefore, that city of Houston Ordinance §8941 has itself, prior to the case at bar, been held valid by the Courts of Texas (as have similar ordinances of other Texas cities) and is still valid.

CONCLUSION

WHEREFORE, Respondents pray that Petitioner's Petition for Writ of Certiorari should be in all things denied.

Submitted this 1st day of November, 1967.

WILLIAM A. OLSON
City Attorney

By Homer T. Bouldin
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari has been served upon Presley E. Werlein, Jr., 1350 Esperson Building, Houston, Texas 77002, Charles E. Easterling, 1301 South Coast Building, Houston, Texas 77002, F. Joseph Donohue, Judiciary Square, 503 D. Street, N.W., Washington, D.C. 20001, by placing same in the United States mail, postage prepaid, on this 1st day of November, 1967.

Homer T. Bouldin
HOMER T. BOULDIN
Trial Supervisor
City of Houston
Attorney for Respondents.

APPENDIX "A"

TESTIMONY OF ALCUS GREER, CITY OF HOUSTON ARSON INVESTIGATOR, REGARDING THE ALCO FIREWORKS EXPLOSION AND ITS CAUSES.

ALCUS GREER,

called as a witness on behalf of the Defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Rollins:

Q. Will you state your name, please, to the Judge?
A. Alcus Greer.
Q. And what is your job, Mr. Greer?
A. I am an arson investigator for the Houston Fire Department.
Q. How long have you been with the Houston Fire Department?
A. Since October of 1939.
Q. And specifically on June the 5th, 1953, were you on duty with the Houston Fire Department in the afternoon?
A. Yes, sir, I was.
Q. Do you remember an explosion in the west part of the city at that time?
A. I do.
Q. Where were you at the time that you first became aware of that explosion?
A. In the rear of the old County Jail at the foot of Capitol Avenue.
Q. What were you doing there?
A. Taking a prisoner out of jail to the Fire Department Headquarters at 401 Caroline.

Q. What did you do then?

A. We saw a mushroom-type cloud rising from the area where the explosion occurred and we realized that it was a major fire and we proceded immediately to that location.

Q. You even took your prisoner with you?

A. Yes, sir.

Q. And did you hear anything before you observed this cloud?

A. Yes, sir, we did and it was a noise loud enough to call our attention to the fact that there was some type of explosion, and we determined the location off of Waugh Drive.

Q. Tell us how that cloud looked.

A. At the time that we first saw it, it was a rising cloud and appeared roughly to be about the—well, considerably smaller than the ones that I have seen on TV of the atom bomb explosion.

Q. Then you went to the area where the explosion was?

A. Yes, sir.

Q. Specifically where was it?

A. On Rosine Street, one block west of Waugh Drive, in about the 1200 block.

Q. And what did you find or observe out there?

A. We parked about a block from the location where the explosion occurred as we did not know the exact location at that time, Harry Foster, my partner who was with me at the time, and myself determined that extensive damage had been done to stuctures for one and a half to two blocks away from the scene of the center of the explosion, and there was a building burning as I recall now, of course, that has been some 13 years ago, but there was a structure on Waugh Drive on fire and we walked about a block or a block and a

half to the location where the explosion had occurred and found extensive damage in the center of a block area there, which as I recall, I think was around Rosine and Rochow and Clay, but there were a number of structures that were badly damaged and there were several apartments on Clay where most of the rear of the structure had been demolished by the blast, and houses to the west of the explosion that were totally destroyed.

Q. All right. In June, 1953, were you an arson investigator?

A. Yes, sir.

Q. As part of your duties did you make a study of that to determine the cause?

A. Yes, sir.

Q. And what, in your—you did make such a study?

A. Yes, sir.

Q. And what, in your opinion, was the cause of that explosion?

A. The blast occurred in the structure located and sitting off Rosine Street, not in the center but in the direction of the center of the block; the building where the explosion occurred, it was totally gone, no evidence of anything, and there was no question that at that immediate location, and it was determined by us as being a fireworks explosion.

Q. In your further investigation did you determine any people that were killed or injured—

MR. WERLEIN: Your Honor, we object. It is irrelevant and immaterial to this suit.

THE COURT: Overruled.

A. There were four deaths involved.

Q. And aside from that, how many injuries?
A. About 75.
Q. Mr. Greer, was there any warehouse storing fireworks across from the blast that was still there?
A. Yes, sir.
Q. Were you able to determine the center of the blast right across the street from this warehouse that had any fireworks in it?
A. Yes, sir, right across the street, the blast was located in a structure back west of Rosine Street and the other structure with the fireworks was on the east side of Rosine.
Q. Did you determine if that was the Alco Fireworks warehouse that blew up?
A. I did.

MR. ROLLINS: I believe that's all. (S.F. Pgs. 221-231)

APPENDIX "B"

TESTIMONY OF HON. WILL G. SEARS, CITY ATTORNEY AT THE TIME OF THE ALCO FIREWORKS EXPLOSION, REGARDING THE DEVASTATION CAUSED THEREBY, HIS FINDINGS AND RECOMMENDATIONS, AND THE REASONS FOR THE PREPARATION AND PASSAGE OF ORDINANCE §8941.

MR. ROLLINS: Explain that, Mr. Sears.

A. An explosion had taken place that blew roofs and walls off of surrounding buildings and surrounding buildings caught on fire and there was debris over three or four blocks and bricks and shingles had been blown off of buildings, and the police had the entire area roped off and evacuated when I got there; and the Fire Department had put out the major fires but fires were still smouldering in surrounding houses. . . . and it is hard to explain the devastation that we saw. (S.F. 177, L 2-13).

* * * * *

A. Yes, sir. Well, the former Chief of Police Carl Shuptrine, who was then an inspector, ... and Legal Department Investigator Al Cooper and myself went all through the neighborhood and we found tangled masses of destruction a considerable distance from where the Alco building had been, and either on the 7th or the following date Lt. Cooper and myself returned there, and we took pictures of this mass of debris which was found in the streets, and in the yards and found it considerable distance from where the explosion actually took place. (S.F. 183, L 4-16)

* * * * *

Questions by Mr. Rollins:

Q. Mr. Sears, I believe just before the recess I asked you if you had made a report to Mayor Hofheinz, then the Mayor of the City of Houston, and to the City Council?

A. Yes, sir, I made a written report and a recommendation too.

Q. What was your recommendation?

A. My recommendation to the Mayor was—

MR. WERLEIN: Your Honor, we object what he may have recommended would not be material. It's not shown that he is an authority or an expert on explosions or an authority on pyrotechnics, and if any opinions were based on hearsay it would not be admissible, and for lack of a proper predicate we ask that he not be able to testify to that.

THE COURT: What is the materiality of this?

MR. ROLLINS: To show the circumstances around the enactment of Ordinance 8941, and it is to show that the ordinance is not arbitrary or capricious.

MR. EASTERLING: Well, Your Honor, we have the ordinance itself.

THE COURT: Well, the fact that it has been enacted—

MR. BOULDIN: Your Honor, we think it is admissible for the reason that the Courts have held that the question is if Council acted unreasonable, arbitrary or capricious in passing an ordinance, and we say that it depends on their investigation and also the circumstances existing. And we think it is admissible for that purpose.

THE COURT: Under those circumstances go ahead.

Q. What was your recommendation to Council?

MR. EASTERLING: Please note our exception.

Q. Was it an oral recommendation?

A. I don't remember, I know a recommendation was made to the Mayor and I reported to Council in one of the Council meetings.

Q. I'll show you what has been marked as Defendant's Exhibit No. 14. Can you identify that?

A. Yes, sir.

Q. What is it?

A. That is the report that I made to the Mayor of the investigation of the explosion of the Alco Fireworks and Specialty Company on Rosine Street and prepared by me on June the 8th, 1953, and delivered to Mayor Hofheinz.

Q. Does that contain your recommendations to Mayor Hofheinz?

A. No, sir, it does not.

Q. What does this contain?

A. The findings on the ground at the time, the cause of the explosion, and this report was accompanied by a recommendation, and if this was in writing or not I do not know, but I know that I was instructed by the Mayor and the Council and the Fire Marshal to prepare an ordinance immediately.

Q. Was that ordinance prepared?

A. Yes, sir.

Q. And that was Ordinance 8941?

A. Yes, sir, this is the ordinance which I myself prepared and was enacted by Council a few days following the explosion.

Q. And this ordinance was duly enacted and properly—

MR. WERELIN: We object, Your Honor, the statements of Counsel now is an assumption.

MR. ROLLINS: We will have Mrs. Russell here in the morning to prove this up.

MR. EASTERLING: We do not object to the ordinance but we object to you testifying that the ordinance was based on anything except what it states.

MR. ROLLINS: All right. Mr. Sears, you stated that—

MR. EASTERLING: We object to leading now.

Q. Did you or not make a recommendation to the Mayor?
A. Yes, sir, I did.
Q. What did you recommend to the Mayor?
A. That this ordinance be prepared and enacted by the Council.
Q. That is this Ordinance 8941?
A. Yes, sir.
Q. And you did prepare this Ordinance 8941?
A. Yes, sir.
Q. And you made this report to the Mayor of your findings?
A. Yes, sir.

MR. ROLLINS: We offer it. (S.F. 189, L 17-25; 190, L 1-25; 191, L 1-25; 192, L 1-25; 193, L 1-8).

APPENDIX "C"

MUNICIPAL ORDINANCES OF MAJOR CITIES THROUGHOUT THE UNITED STATES WHICH PROHIBIT THE STORAGE OF FIREWORKS WITHIN THEIR CITY LIMITS.

Birmingham, Ala. [Code, 1923, §1954, 181 So. 906 (Ala. Sup. 1938)]
Dallas, Texas [Pgs. 13-14, supra]
Denver, Colorado [Rev.Mun.Code 224.8]
Fort Worth, Texas [Pgs. 14-15, supra]
Houston, Texas [Ord. #8941]
Milwaukee, Wis. [Milwaukee Code #47-20]
Minneapolis, Minn. [Ord. #661.030]
New Orleans, La. [Fire Prevention Code # 15.01]
Oklahoma City, Okla. [Ord. #30.12.02]
Phoenix, Ariz. [Fire Prevention Code #12.07]
Pittsburg, Pa. [Fire Prevention Code, Art. 13, Sect. 13.3b.]
St. Louis, Mo. [Ord. #49535]
Tulsa, Okla. [Tulsa Rev. Ord. Tit. 14, Sect. 19]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 696

ALPHA ENTERPRISES, INC., *Petitioner*

v.

CITY OF HOUSTON, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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ALPHA ENTERPRISES, INC., *Petitioner*

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CITY OF HOUSTON, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner, ALPHA ENTERPRISES, INC., respectfully petitions for rehearing as follows:

Petitioner, ALPHA ENTERPRISES, INC., asks that the Court grant rehearing of its order of December 11, 1967 denying their petition for a Writ of Certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

ALPHA ENTERPRISES, INC., approximately fourteen (14) years ago purchased land outside of the city limits of Houston and constructed certain improvements on said land to be used for the operation of a wholesale

fireworks business, engaged in both interstate and intrastate commerce. For approximately fourteen (14) years said land has been used by said Plaintiffs for such purpose. The fireworks normally and presently stored on Petitioner's premises are ICC Class C Common Fireworks as defined by Article 1725 of the Penal Code of Texas, and under the law of the State of Texas are allowed to be sold through retail sales between the twenty-fourth day of June and the fourth day of July each year, and between the fifteenth day of December and midnight of the first day of January of the following year. Since February 1, 1958, the effective date of the first statute regulating fireworks in Texas, fireworks in the State of Texas have been regulated by state statute, and Petitioners have operated said business under said licensing law at its location at 12514 Gulf Freeway, Houston, Texas. Since said fireworks business has been a registered business by the State of Texas, Petitioners have secured a license from the State for the purpose of operating their business each year. The business of Petitioner is not only that of intrastate, but part of same also involve shipments in interstate commerce, in that shipments arrive at Petitioner's business location from other states and from foreign countries, are temporarily placed in the business location of the Petitioner and then forwarded in interstate commerce to the other states in the Southwest, the packages of said fireworks being unbroken during the time they are in the possession of the Petitioner, and before leaving for other states. The Petitioners have complied with all of the laws of the State of Texas and of the laws of the United States governing the shipment of fireworks in interstate commerce. The Petitioners have invested a great sum of money in purchasing the property from which

they operate and in constructing the various improvements located thereon, and said improvements and property are of such a nature that any other use of same other than for the storage and sale, by wholesale, of Class C Common, Class A, and Class B fireworks would be impracticable.

At the time Petitioners purchased the property from which they operate, said property was located on the Gulf Freeway and was approximately seven miles outside of the jurisdictional limits of the City of Houston, Texas. Sometime during the latter part of the year 1965, the City Council of the City of Houston passed an ordinance under the terms of which the property involved herein was annexed and made a part of the City of Houston. However, the property located immediately to the rear of and adjoining Petitioner's property was not annexed under such ordinance, and is still located in the County outside of the Houston City Limits and not subject to the ordinance herein complained of. The City of Houston, Texas has threatened to seize and destroy all fireworks presently in possession of Petitioners at their business location. Such threats are based on Section 15-66 of Article IV of the Code of Ordinances of the City of Houston providing as follows:

> "Sec. 15-66. Enforcement-Declaration of nuisance, seizure of articles, injunction, right of entry of officers.
>
> The presence of any fireworks within the jurisdiction of the city in violation of this article is hereby declared to be a common and public nuisance. The fire marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this article

and any member of the fire prevention division of the fire department of the city or any police officer of the city or any other duly constituted peace officer is empowered to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the fire marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section. Notwithstanding any penal provision of this article, the city attorney is authorized to file suit on behalf of the city or the fire marshal or both for injunctive relief as may be necessary to prevent unlawful storage, transportation, keeping or use of fireworks within the jurisdiction of the city and to aid the fire marshal in the discharge of his duties and to particularly prevent any person from interfering with the seizure and destruction of such fireworks; but it shall not be necessary to obtain any such injunction relief as a prerequisite to such seizure and destruction. The fire mashal or any member of the fire prevention division of the fire department is hereby authorized to enter any building where the unlawful presence of fireworks is suspected in order to inspect the same for the presence of such fireworks.".

It is perfectly obvious from reading said Ordinance that same is so broad that it does interfere with interstate commerce, and because of such fact is unconstitltional. That for approximately thirteen (13) years Petitioners operated from the business location on the Gulf Freeway without being interfered with by the City of Houston, Texas and they were not bothered in any way until after the Annexation Ordinance above mentioned was passed. In other words, for approximately thirteen (13) years Petitioner operated a legal business and for the last

eight (8) years one licensed by the State of Texas and suddenly, because of the Annexation Ordinance, they were no longer operating a legal business, but same overnight became illegal. Petitioner says that the mere presence of fireworks is not a danger to persons or property and could not be a nuisance, and that the City of Houston, Texas has no legal right to declare that to be a nuisance which is not a nuisance, in fact Petitioner's business is one licensed by the State of Texas, and yet the City of Houston, Texas in total disregard of Petitioner's property rights have threatened to and will seize and confiscate Petitioner's property without payment therefor, unless restrained from so doing by this Honorable Court, even though such confiscation would be of property in interstate commerce.

This Writ of Certiorari is sought for the purpose of declaring the ordinance above set out prohibiting the mere presence of fireworks within the City a nuisance to be unconstitutional because it prohibits a legal business licensed by the State from operating, is not merely regulatory but actually confiscatory, provides for the taking of property without due process of law, and attempts to prohibit a business engaged in interstate commerce. This Writ is also sought for the purpose of enjoining the City of Houston, the Fire Marshal, and Fire Chief and other employees and servants of the City from seizing and confiscating the fireworks belonging to Petitioner. The use made by Plaintiffs of the property in question for approximately fourteen (14) years is a valid use and it is unfair and unreasonable for the City of Houston, Texas to come out and annex Petitioner's property and then declare Petitioner's business to be illegal and a nuisance. At the time Petitioners purchased their property in 1953,

well beyond the jurisdictional limits of the City of Houston the confiscatory ordinance in question did not apply to them and now fourteen (14) years later the City of Houston says that the fourteen (14) year old ordinance now applies to their property even though they are located at the same place and doing the same kind of business for the entire fourteen (14) years. That Respondents furthermore are violating the Fourteenth Amendment of the Constitution of the United States in that said Respondents are in effect taking the real property of Petitioner, without compensating them, in that they are restricting the use of said property from that which Petitioners have received a license to operate from the State of Texas and thereby are limiting the uses to which said property may be put. By reason of the threatened action of the City of Houston Petitioners have suffered and will continue to suffer great immediate and irreparable loss, injury and damage for which Petitioners have no adequate remedy at law unless this Honorable Court grants a Writ of Certiorari to review this case in its entirety.

The opinion of the Court below neglected to discuss or answer the contention of the Petitioner that Article IV, Section 15-66, Code of Ordinances of the City of Houston imposed a restriction upon products received and shipped by the Petitioner in interstate commerce. All of the facts in this case reveal that the Petitioner has been receiving and shipping in interstate commerce for fourteen years the same commodity which the Ordinance of the City of Houston now declares a common and public nuisance. During all of the time that the property was shipped and received in interstate commerce they were never the object of confiscation or abatement as a

nuisance by the Respondents, City of Houston. There is no limitation or restriction in the "Nuisance Ordinance" put into effect by the Respondents, City of Houston, which exempt these products from being destroyed while in interstate commerce shipment.

The only answer of the Respondents, City of Houston, attempting to justify their ordinance has been that it was enacted in 1953 after an explosion in the City of Houston. Such fact has no relationship to the present existing state law of the State of Texas which authorizes the Petitioner to engage in the sale and storage of fireworks within the State of Texas. The application of the Ordinance was questionable at the time it was passed in 1953, as being unconstitutional, and is even more so after the State of Texas enacted statutory laws authorizing the sale and storage of fireworks within the State of Texas in 1958. Products which are regulated, inspected and authorized by the State of Texas cannot be a nuisance by their mere presence anywhere. Yet, the Ordinance complained of by the Petitioner declares the mere presence of fireworks within the City of Houston a common and public nuisance. The use, condition, or location is not made a basis of their being a common and public nuisance. There is nothing in the Ordinance to prevent the Police Department of the City of Houston from summarily confiscating and destroying fireworks in shipment as they pass through or into the territorial limits of the City of Houston. Such Ordinance clearly violates the commerce clause of the Constitution which guarantees citizens of the United States the right of movement in regular course of their products.

The Respondents have not cited one single case wherein the Court has upheld an ordinance or statute which

declares a product to be a common and public nuisance where such product is licensed, regulated and inspected by the State through its legislative enactments. Nor can such case be found.

Respondents cite *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (1919) as being authority for upholding their contention. Such case falls far short of authorizing the summary confiscation of any product, but merely prohibits the storage of gasoline within three hundred (300) feet of any dwelling house. The object of the Petitioner is not to complain of storage of its products at a regulated distance but to prevent confiscation of such products in interstate commerce for shipment.

All of the other Texas cases cited in Respondents' reply brief were cases that were decided by the Texas Courts prior to the passage of legislation by the State Legislature in 1958 authorizing the sale and storage of fireworks within the State of Texas and are no longer applicable after the legislative authorization for fireworks within the State.

It must be kept in mind that the same ordinance provision was declared unconstitutional in *City of Fort Worth v. Atlas Enterprises,* 311 S.W.2d 922 (Fort Worth Court of Civil Appeals, 1958) wherein the Court said:

> "Furthermore, since the ordinance discriminates against interstate commerce, will impede its movement in regular course, and will affect it directly, it is in conflict with the commerce clause of the United States Constitution, art. 1, Section 8, cl. 3 Title 18 U.S.C.A., Ch. 39, Section 835. exhibits congressional delegation of authority to the Interstate Commerce Commission to regulate and control

the transportation within the limits of the United States of explosives and combustibles. Fireworks are of this character. Regulations of the Interstate Commerce Commission have been promulgated pursuant to authority so conferred. The regulations are before us."

Petitioner again submits that it was entitled to have the Court below pass on its constitutional question involving the undue burden and restriction placed on interstate commerce by this "nuisance ordinance" of the City of Houston, Texas. This, the Court below failed to do, and instead, choose to ignore completely the existence of this important question. If there is any doubt in the minds of this Court whether there might be a reasonable basis for the decision of the Court of Civil Appeals, we submit that the Supreme Court can and should vacate the decision below for further proceedings and the clarification of its decision. *Minnesota v. National Tea Company*, 309 U.S. 551. The Petitioner requests nothing more than that the Court of Civil Appeals tell us that this ordinance does or does not violate the constitutional provisions governing interstate commerce.

CONCLUSION

For the reasons set forth above and in its original petition for Certiorari, Petitioner respectfully moves for rehearing, and for the grant of Certiorari.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of the Supreme Court.

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Attorneys for Petitioner